Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, requires that the plaintiff prove proximate causation as an element of a claim for damages.

2. Whether the imposition of liability under FELA based upon exposure to *any* diesel exhaust conflicts with this Court's decisions requiring courts to defer to a federal agency's interpretation of its own safety regulation.

LIST OF PARTIES AND AFFILIATES

The parties to this matter are listed in the caption to the petition.

RULE 29.6 STATEMENT

Petitioner Consolidated Rail Corporation ("Conrail") is jointly owned by CSX Corporation and Norfolk Southern Corporation, both of which are publicly traded and, indirectly, hold more than 10% of Conrail's stock. No other publicly held company owns more than 10% of Conrail's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Conrail respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinions of the Court of Common Pleas of Lucas County, Ohio granting Respondent's motions for partial summary judgment are reproduced in the appendix to the petition ("Pet. App.") at 28a-33a, and 34a-38a. The opinion of the Court of Appeals of Ohio, Sixth Appellate District, affirming the judgment of the trial court is unreported, and is reproduced at Pet. App. 2a-27a. The order of the Supreme Court of Ohio declining to review the decision of the Court of Appeals is reproduced at Pet. App. 1a. The order of the Supreme Court of Ohio denying Conrail's timely motion for reconsideration is reproduced at Pet. App. 39a.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 16, 2009. The Supreme Court of Ohio, with three justices dissenting, declined to review the decision of the Court of Appeals on February 10, 2010. On April 14, 2010, the Ohio Supreme Court denied Conrail's timely motion for reconsideration of its order declining to review the judgment of the Court of Appeals. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, are reproduced at Pet. App. 40a. Relevant portions of the

Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, are reproduced at Pet. App. 41a. The Railroad Locomotive Safety Standard appearing at 49 C.F.R. § 229.43(a) is reproduced at Pet. App. 42a.

STATEMENT OF THE CASE

In this case, Respondent Francis Battaglia obtained $2,600,000 in damages under the Locomotive Inspection Act, 49 U.S.C. § 20701 ("LIA"), and the Federal Employers' Liability Act, 45 U.S.C. § 51 ("FELA") based upon his claim that he suffered from asthma caused by exposure to diesel exhaust while employed by Conrail. Pet. App. 2a ¶ 1; *id.* at 3a ¶¶ 4-5. The trial court granted summary judgment for Battaglia as to causation, and the court of appeals affirmed, because both courts concluded that FELA requires only that the exposure to diesel exhaust "contributed to any degree, even the slightest, to Plaintiff's asthma." *Id.* at 32a; see *id.* at 7a ¶ 26, 11a ¶ 40. The trial court also granted summary judgment to Respondent, and the court of appeals affirmed, based upon the conclusion that exposure to diesel exhaust at *any* level violates 49 C.F.R. § 229.43, a safety regulation under the LIA promulgated by the Federal Railroad Administration (FRA). The violation of that safety regulation, in turn, was deemed to constitute negligence *per se* under FELA. This case presents two issues of recurring national importance.

First, the case presents the issue whether a plaintiff must prove that an alleged violation of FELA was a proximate cause of his injuries, or whether, as the trial court and the court of appeals ruled, plaintiff must show only that a violation "contributed to any degree, even the slightest" to plaintiff's alleged injuries. Courts across the country have reached

conflicting decisions regarding what is required to establish causation under FELA, and that conflict has grown more pronounced in the wake of this Court's ruling and separate opinions by concurring Justices in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158, 160 (2007).

In *Sorrell*, the full Court declined to reach the issue whether proximate causation was an element under FELA, but, in a concurring opinion, Justice Souter, joined by Justices Scalia and Alito, argued that proximate causation is an element under FELA. Justice Souter explained that the "even the slightest" language from *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957), did not provide an alternative causation standard. 549 U.S. at 172-77 (Souter, J., concurring). Justice Ginsburg, in contrast, expressed her view that *Rogers* adopted a "relaxed" causation standard for FELA claims. *Id.* at 178 (Ginsburg, J., concurring in judgment). These competing views about the requirements of FELA mirror a deep divide among federal and state courts throughout the nation. *Id.* at 173 n.* (Souter, J., concurring) (identifying conflicting authorities).

As a result of this conflict, plaintiffs and defendants across the country are subject to different standards for proving a core element under FELA depending on geography and, in some states, depending upon which court (federal or state) the case is filed. This deep and persistent conflict undermines FELA's goal of "creat[ing] uniformity throughout the Union" in cases involving injuries to railroad employees. *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980). Here, in seeking summary judgment, respondent highlighted that he was not required to prove "proximate cause," and the trial court's grant of summary judgment was predicated upon its

assessment whether the record satisfied the "relaxed" "even slightest degree" standard first set forth in *Rogers*. As a result, this case squarely presents the issue whether proximate causation is an element under FELA.

Second, this case presents the question whether the courts below violated this Court's precedent when they refused to consider the views of the Federal Railroad Administration (FRA) – the agency that promulgated and enforces the LIA safety regulation at issue in this case – when assessing whether the safety regulation's requirements had been violated. The FRA has concluded, in a report to Congress, that it looks to the exposure thresholds adopted by OSHA "to determine compliance with the Locomotive Inspection Act." Pet. App. 46a. That interpretation is entirely consistent with the language of § 229.43(a), and therefore is subject to deference under this Court's controlling decisions.

The court below, however, disregarded the FRA's interpretation and concluded that a railroad violates 49 C.F.R. § 229.43 whenever diesel exhaust makes its way into a locomotive cab. Pet. App. 10a-11a ¶ 38. The refusal of the court of appeals to consider the FRA's interpretation of its own safety regulation is contrary to this Court's holdings that require "substantial deference to an agency's interpretation of its own regulations" so that "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord* 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:22, at 105 (2d ed. 1979). That deference is all the more appropriate

where, as here, the regulation concerns "a complex and highly technical regulatory program." *Thomas Jefferson Univ.*, 512 U.S. at 512.

The erroneous ruling of the court below is one of surpassing importance because the standard adopted imposes an onerous and unwarranted burden on railroads by subjecting them to liability without any finding that the levels of diesel exhaust exceed permissible thresholds identified by OSHA. Because the decision below is irreconcilable with the standards established by this Court, certiorari should be granted.

A. Statutory Background

For more than a century, FELA has provided a remedy under federal law for railroad workers whose workplace injury or death was caused by the actions of a railroad. 45 U.S.C. § 51. The interpretation of FELA is guided by a clear and simple rule: "Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-66; *accord Consol. Rail* v. *Gottshall*, 512 U.S. 532, 544 (1994); *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). Thus, the elements of a common-law negligence claim apply to actions under FELA unless FELA's text explicitly rejects or obviously conflicts with the traditional common-law standard. *Sorrell*, 549 U.S. at 165-66.[1]

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[1] For example, FELA expressly departed from the common law by abolishing the contributory negligence defense and instead adopting a comparative negligence regime, which was an innovation when FELA was enacted in 1908. 45 U.S.C. § 53 ("the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."). FELA

FELA differs from a traditional workers compensation statute, however, as it does not adopt no-fault liability in exchange for a cap on recoveries. Instead, FELA requires proof of railroad negligence and allows traditional tort damages. As a result, FELA plaintiffs must prove "causation, i.e., the relation of the negligence to the injury." *Sorrell*, 549 U.S. at 169. As to the element of causation, shortly after FELA's enactment, this Court held that a plaintiff proceeding under FELA must prove that the injury flows proximately from the railroad's negligence. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-20 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

More than 40 years later, in *Rogers* v. *Missouri Pacific Railroad*, this Court stated that in actions under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." 352 U.S. at 508 (emphasis added). In the wake of this statement from *Rogers*, lower federal and state courts have applied differing standards to the element of causation under FELA. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring).

As to the element of negligence, a FELA plaintiff may establish negligence by demonstrating that the railroad violated a safety statute, thereby making the railroad *per se* negligent. See *Urie*, 337 U.S. at 174. One such safety statute is the LIA (originally the Boiler Inspection Act), which requires railroads to keep locomotives "in proper condition and safe to

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also "abolished the fellow servant rule . . . , prohibited employers from contracting around the Act, and abolished the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). To implement this statutory command, the FRA promulgated 49 C.F.R. § 229.43(a), which provides:

> Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

Id. FRA explained when it adopted the current version of § 229.43 that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980). Specifically, in a Report to Congress, FRA explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act." Pet. App. 46a; *id.* at 50a ("FRA will also continue to apply OSHA criteria as reference standards to determine compliance with the Locomotive Inspection Act.").

In response to a request for clarification of the requirements of § 229.43(a), FRA explained that it enforces this regulation "by closely inspecting the exhaust system of the locomotive" for defects that result in "exhaust gas discharge into the engine compartment." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment on Count Two, Ex. C at 1, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Feb. 8, 2007) ("Defendants' Brief in Opposition Count Two"). FRA likewise explained that the phrase "'to prevent entry of the products of combustion into the cab' only relates to the height of the exhaust stacks." *Id.* According to FRA, "[i]f the gases are released from a stack of suitable height but some small amount of gas

migrates into the cab of the hauling locomotive . . . because of wind currents the FRA would find this acceptable." *Id.*, Ex. C at 2. Further, if the levels of exhaust gases in the locomotive cab "are less than the standards set forth in the Occupational Safety and Health Administration regulations, no action is required." *Id.*

B. Factual Background

Respondent Battaglia worked for Conrail as a brakeman from 1976 to 1979 and from 1988 to 1993. Pet. App. 2a ¶2. Following training in 1993, Battaglia was promoted to locomotive engineer and remained in that position until November 2007. *Id.* Respondent claims that during his time as a locomotive engineer, diesel exhaust from the locomotive would enter the locomotive cab in which he worked and that he developed asthma as a result. *Id.* at 2a-3a ¶¶ 3-4. Battaglia stated that the level of exhaust in the cab would decrease if the windows of the locomotive were closed. Plaintiff's Motion for Summary Judgment on Count Two, Ex. A at 77, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Jan. 26, 2007) ("Plaintiff's Motion for Summary Judgment").

Prior to his work at the railroad, Battaglia worked as an aircraft electrician, during which time he had significant exposure to asbestos. Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment on Count One, Ex. C at 2, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Sept. 10, 2007) ("Defendants' Brief in Opposition Count One"). Battaglia also smoked a pack of cigarettes each day for 13 years. *Id.* Battaglia was diagnosed with adult onset asthma, although subsequent physicians have diagnosed him with emphysema rather than asthma. *See* Brief of

Consol. Rail Corp. at 4, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Jan. 2, 2009) ("Conrail Br."); Reply Brief of Consol. Rail Corp. at 7, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Mar. 16, 2009) ("Conrail Reply Br.").

C. Proceedings Below

1. On September 9, 2005, Battaglia filed suit in the Court of Common Pleas of Lucas County, Ohio, alleging that exposure to diesel exhaust had caused his asthma. Pet. App. 3a ¶ 5. He asserted LIA and FELA claims, alleging both that the railroad violated the LIA through 49 C.F.R. § 229.43, and that this violation had a sufficient causal relationship to his injuries to warrant relief under FELA.

Battaglia moved for summary judgment on his LIA claim. He first argued that, under § 229.43, petitioner "had an absolute duty to prevent diesel fumes from entering the cab while the Plaintiff's decedent [sic] was working . . . ." Plaintiff's Motion for Summary Judgment at 12. According to Respondent, § 229.43 does not "permit 'some,' or 'limited,' or even '*reasonable*' amounts [of diesel exhaust] to be emitted within the cab." *Id.* at 11 (emphasis added). Rather, he argued that the LIA imposes "[s]trict liability . . . based merely on the fact that the exhaust was present in the cab in violation of federal regulations under regular operating conditions." *Id.*[2]

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[2] Conrail disputed respondent's reading of the requirements of the LIA and highlighted that the FRA has interpreted § 229.43 to permit some levels of diesel exhaust in locomotives so long as they are below the permissible levels adopted by OSHA. Pet. App. 30a-31a; *id.* at 8a.

On the issue of causation, Battaglia relied exclusively on a report from his expert Dr. Kelly, who had been retained to offer a medical opinion "regarding the possible causes of Francis Battaglia's asthma." Plaintiff's Motion for Summary Judgment, Ex. C ¶ 3. When Dr. Kelly initially examined Battaglia, he concluded that Battaglia suffered from asbestosis as well as "noise induced hearing loss" given his "history of work-related noise exposure." See Defendants' Brief in Opposition Count One, Ex. C at 4. In support of summary judgment, however, Dr. Kelly submitted a second report in which he concluded that Battaglia's exposure to "diesel exhaust" was "a significant factor in the development of his asthma." Plaintiff's Motion for Summary Judgment, Ex. C ¶ 7.[3]

Based on Dr. Kelly's second report, Battaglia argued that, as a matter of law, "[e]xposure to diesel exhaust contributed to Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 12. Battaglia candidly acknowledged that "it may be very possible that there were other causes that *also* contributed to his asthma," but they were irrelevant because "under the FELA, the railroad is liable for Mr. Battaglia's damages if the exposure to diesel exhaust *contributed to any degree*, even the slightest, to Mr. Battaglia's asthma." *Id.* (emphasis in original). Respondent stressed that, under FELA,

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[3] Conrail disputed Battaglia's showing as to causation through the reports of its own experts, Dr. David Rosenberg and Dr. Laura Green, both of which stated that diesel exhaust had not played any role in Battaglia's alleged injuries. Pet. App. 32a. The trial court, however, refused to credit Conrail's expert reports because they were not sworn, and persisted in doing so even after Conrail submitted affidavits by these experts adopting their expert opinions. Pet. App. 12a.

"[i]n establishing causation, [he] need not prove that exposure to diesel exhaust was the proximate cause of Mr. Battaglia's asthma." *Id.* at 13.[4]

The trial court granted summary judgment to respondent on his LIA claim. It rejected Petitioner's showing regarding the FRA's interpretation of 49 C.F.R. § 229.43(a) because it found "that the regulation is clear and unambiguous – products of combustion shall be released entirely outside the cab." Pet. App. 31a. As a result, it declined to "give deference to FRA's interpretation of the regulation" and concluded that exposure to diesel exhaust, at any level, while in a locomotive cab violated 49 C.F.R. § 229.43. Pet App. 31a.

As to causation, the court also concluded that Petitioner "is liable if the exposure contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a. The trial court held that plaintiff satisfied that burden by crediting the opinion of Respondent's expert that his "'exposure to diesel exhaust . . . was a significant factor in the development of his asthma.'" *Id.* The trial court ruled "that Plaintiff's exposure to the diesel exhaust fumes contributed to his asthma" and therefore "Plaintiff is entitled to judgment as a matter of law." *Id.* at 33a.

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[4] Respondent further argued that in *Rogers*, this Court "held that to establish liability under the FELA, the relevant inquiry is 'whether negligence of the employer *played any part, however small,* in the death or injury which is the subject of the suit." Plaintiff's Motion for Summary Judgment at 12 (citing *Rogers*, 352 U.S. at 508). Respondent included a copy of *Rogers* as an exhibit to his motion and argued that *Rogers*, is "likely the most referred to and cited case by both Federal and State Courts respecting the FELA." *Id.* at 12 n.53.

After the trial court's initial summary judgment ruling, plaintiff moved for summary judgment on the FELA claim arguing that the grant of summary judgment based upon the violation of the LIA resulted in *per se* liability under FELA. The court granted summary judgment on plaintiff's FELA claim. Pet. App. 37a-38a. The case proceeded to a damages-only trial, where a jury awarded plaintiff $2,600,000 in damages.

2. On appeal, Conrail explained that the trial court erred by adopting both an erroneous causation standard under FELA and an erroneous interpretation of the requirements of the LIA.

Conrail argued that the causation standard applied by the trial court – "contributed to any degree, even the slightest" – applies only when deciding whether there is sufficient evidence for a plaintiff "to survive summary judgment." Conrail Br. at 15. Conrail specifically argued that the "any part, even the slightest" language from *Rogers* was not the standard for proving causation because FELA requires a plaintiff to "prove that 'negligence was the proximate cause in whole or part' of the employee's injury." Conrail Reply Br. at 4-5 (quoting *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)).

Likewise, Conrail argued that the "FRA has determined that the mere presence of diesel exhaust in the cab of a locomotive does not constitute a violation . . . of the regulatio[n] set forth in 49 C.F.R. § 229.43(a)." Conrail Br. at 7. Conrail explained that the FRA "utilizes the standards set forth by OSHA to determine compliance with the LIA." *Id.* at 10.

The Ohio Court of Appeals affirmed. It held that the standard for causation under FELA is that "[a]n injury sustained by a railroad worker that is caused

in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages." Pet. App. 11a ¶ 40 (citing *Rogers*, 352 U.S. at 508). According to the Court of Appeals, under *Rogers*, "when a railroad's negligence, in any degree, contributes to an injury at issue in a FELA claim, liability adheres to the railroad." *Id.* at 7a ¶ 26.

The Court of Appeals also ruled that 49 C.F.R. § 229.43 prohibits the presence of any diesel exhaust in a locomotive cab. Pet. App. 10a-11a ¶ 38. The court of appeals did not address the FRA's interpretation of this Rule. Specifically, it did not assess whether the exhaust allegedly entered the cab after being released from the exhaust stack or whether it entered the cab directly from the locomotive's exhaust system. Nor did the court evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA. Instead, the court of appeals ruled that "the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions." *Id.* The court stated that the rule "direct[s] that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through stacks of sufficient height or to provide 'other means' to prevent the exhaust from entering the cabin in normal operation." *Id.* According to the court of appeals, "if during normal operation exhaust enters the cab, the rule is violated." *Id.*

3. The Ohio Supreme Court declined to review the decision of the court of appeals, with three justices dissenting.

REASONS FOR GRANTING THE PETITION

The petition should be granted to resolve two issues of nationwide importance. First, the decision below implicates a deep division of authority among the lower federal and state courts on the issue whether a plaintiff must establish proximate causation as an element of his or her claim under FELA. That conflict turns on a determination whether this Court's decision in *Rogers* "relaxes" a plaintiff's traditional requirement to prove proximate causation in an action under FELA. As Justice Souter explained in *Sorrell*, confusion surrounding this Court's decision in *Rogers* has led to a deep division among lower courts over the question whether FELA requires a showing of traditional proximate cause or, conversely, whether it requires only a showing of "slight" cause. See 549 U.S. at 173 n.* (Souter, J., concurring) (recognizing division of authority).

The state supreme courts of Iowa, Minnesota, Montana, Nebraska, Utah, and West Virginia have all held that a FELA plaintiff must establish that their injuries were the proximate result of the defendant's action. In contrast, the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have all concluded that *Rogers* relaxed the common law requirement, and that FELA requires plaintiffs to prove only "slight cause." Certiorari is necessary to clarify that FELA plaintiffs must prove that their injuries were the proximate result of a railroad's negligent actions.

Resolution of this conflict is critical because of the dispositive and recurring nature of this issue; causation will be at issue in nearly every FELA case. The difference between the two standards for causation has proven outcome determinative in a large number of cases. In this case, respondent

highlighted that he was not required to prove "proximate causation" and relied heavily upon the "relaxed standard of causation under the FELA" to support his argument that "exposure to diesel exhaust contributed to any degree, even the slightest, to Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 12. The trial court and court of appeals agreed that summary judgment on causation was appropriate because the single expert's opinion met the relaxed "contributed to any degree, even the slightest" standard those courts derived from *Rogers*. As such, the judgment below fundamentally depends on whether proximate causation is an element of a plaintiff's case under FELA.

Second, this Court's review is warranted in light of the lower courts' refusal to consider the federal agency's interpretation of the requirements of that agency's regulation. Conrail showed that, in assessing whether a railroad has violated 49 C.F.R. § 229.43(a), the FRA "employs [OSHA's] criteria" regarding "workplace concentration limits" for the "common products of diesel fuel combustion" in order "to determine compliance with the Locomotive Inspection Act." The court below ignored the FRA's interpretation, and instead concluded *de novo* that entry of *any* diesel exhaust into a locomotive cab violates the LIA, even if the levels are below the thresholds adopted by OSHA, and thereby imposes per se liability on the railroad.

In reaching this conclusion, the courts below ignored this Court's cases holding that deference must be accorded to an expert agency's interpretation of its own regulations. Instead, the courts below adopted an interpretation of an FRA regulation that imposes liability without any showing that employees

are exposed to conditions that create "unnecessary danger of personal injury." 49 U.S.C. § 20701(1). That ruling places substantial and unwarranted burdens on railroad carriers that stand in stark contrast to the FRA's conclusion regarding the burdens imposed by this regulation. Review of this issue is warranted because the ruling below conflicts with the controlling interpretive rules set forth by this Court.

In tandem, these two rulings make it virtually impossible for a railroad to defend itself against a claim of injury based on diesel exhaust fumes. The plaintiff need only prove some exposure, which will be based solely on his or her testimony, and have an expert say that the exposure contributed at least "slightly" to the plaintiff's condition. Railroads will have liability imposed without the benefit of a trial, and the only issue for the jury will be the size of the damages. That is not the liability scheme that Congress created in enacting FELA and this Court should intervene now to rectify this harmful and unwarranted situation.

I. THE DECISION BELOW IMPLICATES A DEEP CONFLICT OVER THE ISSUE WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA.

Review is warranted because there is a deep and persistent conflict on the issue whether a plaintiff is required to establish proximate causation as an element under FELA. A host of state Supreme Courts have held that proximate causation is an element under FELA. In contrast, a number of federal courts of appeals have held that the relaxed "slight" cause standard set forth in this Court's decision in *Rogers* properly states a plaintiff's obligation as to causation in a FELA case. Review is

especially warranted because a number of courts have acknowledged the competing concurring opinions in *Sorrell*, but those courts deemed themselves without authority to depart from their interpretation of *Rogers* absent an express ruling from this Court. Resolution of this conflict will have a broad impact on cases across the country in which courts and juries must decide whether the evidence is sufficient to establish causation under FELA.

A. There Is A Deep Division Of Authority Over The Standard For Proving Causation Under FELA.

1. As Justice Souter thoroughly documented in his concurring opinion in *Sorrell*, there is a very mature conflict in the federal and state lower courts over whether plaintiffs under FELA must prove that their injuries were proximately caused, in whole or in part, by the defendant's negligence.

Most recently, the Utah Supreme Court followed Justice Souter's concurrence in holding that plaintiffs proceeding under FELA must prove that employer negligence proximately caused the plaintiff's injuries. Recognizing the "extensive debate" over the importance of the phrase "even the slightest" from *Rogers*, the court determined that "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case." *Raab* v. *Utah Ry.*, 221 P.3d 219, 229 (Utah 2009). The court concluded that FELA requires a plaintiff to prove proximate causation based on its finding that "there is no [ ] statutory support for reading *Rogers* as eliminating the requirement of proximate causation" and that such a holding "would be contrary to the Supreme Court's approach to FELA." *Id.* at 229-30.

Even before *Sorrell*, substantial authority supported the conclusion that *Rogers* did not "relax" the common-law standard of causation for actions under FELA. In *Marazzato* v. *Burlington Northern Railroad*, for example, the Montana Supreme Court held that a plaintiff proceeding under FELA "has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. 817 P.2d 672, 675 (Mont. 1991) (internal quotation marks omitted). Like the Utah Supreme Court, the court in *Marazzato* rejected the argument that *Rogers* abridged the common-law requirement to prove proximate causation. Rather, the court concluded that *Rogers* dealt with the unrelated issues of multiple causation and contributory negligence. The supreme courts of Iowa, Minnesota, Nebraska, and West Virginia have likewise held that FELA plaintiffs must prove that employer negligence proximately caused their injuries.[5]

2. In contrast, other courts have relied upon language in *Rogers* to hold that FELA abrogates the common-law requirement of proximate causation in favor of a "relaxed" standard of causation. These

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[5] *See Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) (requiring, under FELA, that negligence "contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) (requiring, under FELA, that negligence "proximately caused, in whole or in part, the accident"); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) (ruling that FELA requires that employer's negligence "is a proximate cause of the employee's injury"); *Brabeck* v. *Chi. & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962) (ruling that liability under FELA attaches only if the conduct is "proximate cause of an accident"); *cf. Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 720-21 & nn.2-3 (Ohio 1961) ("relaxed" standard in *Rogers* applies only to assess whether plaintiff's evidence creates a jury question).

courts, including the courts in this case, align themselves with Justice Ginsburg's concurrence in *Sorrell*, see 549 U.S. at 180, in holding that "[a]n injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer results in the obligation of the employer to pay damages." Pet. App. 11a ¶ 40 (citing *Rogers*, 352 U.S. at 508).

Most recently, the Seventh Circuit held that "common-law proximate causation is [not] required to establish liability under the FELA." *McBride* v. *CSX Transp., Inc.*, 598 F.3d 388, 406 (7th Cir. 2010). The court conceded the "considerable force" of Justice Souter's concurrence in *Sorrell*, but declined to "embrac[e] Justice Souter's view at this juncture." *Id.* at 404. That court highlighted that lower courts "have been admonished not to anticipate future actions of the Supreme Court" for "'it is [the Supreme Court's] prerogative alone to overrule one of its precedents.'" *Id.* at 405 (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)). As a result, the Seventh Circuit joined the federal and state jurisdictions embracing the "relaxed" standard of causation in FELA actions, largely based on its own previous interpretations of several of this Court's precedents. *See id.* at 405-06.

Specifically, the Second, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits treat *Rogers* as establishing that a FELA plaintiff need only prove that the railroad's negligence was the "slightest cause" of the employee's injuries.[6] The same is true

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[6] *See Williams* v. *Long Island R.R.*, 196 F.3d 402, 406-07 (2d Cir. 1999) (applying "relaxed standard" of causation to claim under FELA); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997) (ruling that the Supreme Court

of courts in Alabama, the District of Columbia, Florida, Mississippi, South Carolina, Texas, and Washington.[7]

These jurisdictions view *Rogers* as having established that "'proximate cause' is not required to establish causation under FELA." *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); see *Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 28 & n.6 (S.C. 2008) (relying on Justice Ginsburg's *Sorrell* analysis in affirming South Carolina's use of a "relaxed" causation standard in actions under FELA). They rely almost entirely on the "even the slightest" language from *Rogers*, and to the extent they reference FELA's statutory text at all, they cite only to FELA's "in whole or in part" language as the basis for a "relaxed" standard of causation. *E.g.*, *Williams* v. *Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999). As Justice Souter's *Sorrell* concurrence makes clear, this interpretation fundamentally misconstrues both the statutory text and *Rogers* itself.

"definitively abandoned" "proximate causation" in FELA cases in *Rogers*); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) (ruling that "'proximate cause' is not required to establish causation under the FELA"); *Little* v. *Nat'l R.R. Passenger Corp.*, 865 F.2d 1329 (D.C. Cir. 1988) (per curiam) (Table); *See also Johnson* v. *Cenac Towing, Inc.*, 544 F.3d 296, 302 & n.4 (5th Cir. 2008) (applying *Rogers* causation standard to claim under the Jones Act); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (same).

[7] *See Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 26, 28 & n.6 (S.C. 2008); *Canadian Nat'l/Ill. Cent. R.R.* v. *Hall*, 953 So.2d 1084, 1091 (Miss. 2007); *Glass* v. *Birmingham S. R.R.*, 905 So.2d 789, 796 (Ala. 2004); *Keranen* v. *Nat'l R.R. Passenger Corp.*, 743 A.2d 703, 712 (D.C. 2000); *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999); *Maritime Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So.2d 11, 14-15 (Fla. 1972); *Wilmoth* v. *Chi., Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972).

3. The division of authority has deepened in the wake of this Court's decision in *Sorrell*. See, *e.g.*, *Raab*, 221 P.3d at 227 & nn.28-29 (recognizing division of authority); *Montgomery*, 656 S.E.2d at 28 & n.6 (same); *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 489 n.79 (Tex. 2008) (same). And it has become so profound that courts within certain states now apply differing standards to this same statute, depending on whether a case is filed in state or federal court. Compare *Raab*, 221 P.3d at 229 (Utah 2009), with *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); compare *Marazzato*, 817 P.2d at 675 (Mont. 1991), with *Ogelsby*, 6 F.3d at 609 (9th Cir. 1993). This is unquestionably the most intolerable situation because it means that a plaintiff can prevail in one courthouse and lose in another that is located literally across the street. It is bad enough to think that a plaintiff's place of residence can dictate the outcome of a case, but beyond that, the street address of the court now controls the merits of FELA litigation.

The extent of the lower court's decisional division underscores its significance. The proper standard of causation arises in every case brought under FELA. Hundreds of FELA cases are filed each year in federal court alone.[8] Many other FELA claims are asserted in state court. In light of the uncertainty over the proper standard of causation created by *Sorrell*, both plaintiffs and defendants legitimately can seek a favorable causation instruction, incentivizing litigation of this issue in every FELA

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[8] *See* Admin. Office of U.S. Courts, *Annual Report of the Director: Judicial Business of the United States Courts*, tbl.C-2A at 144 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf (more than 3000 federal FELA cases filed from 2005-2009).

case until a clear precedent is established by this Court.[9]

4. This case presents an ideal vehicle to resolve this deep and abiding conflict.

For example, in *Syverson* v. *Consolidated Rail Corp.*, the Second Circuit reversed summary judgment for the railroad, noting that while it would have affirmed dismissal "had this been a negligence action at common law," reversal was required under FELA's "substantially diluted" and "relaxed" causation standard. 19 F.3d 824, 825-28 (2d Cir. 1994) (explaining that FELA permits liability "for risks that would be too remote to support liability under common law"). This case presents the converse situation. In his motion for summary judgment, Respondent argued that "[i]n establishing causation, [Respondent] need not prove that exposure to diesel exhaust was the proximate cause of [his] asthma." Plaintiff's Motion for Summary Judgment at 13. Indeed, Respondent predicated his summary judgment argument on the "relaxed standard of causation under the FELA," *id.*, and acknowledged that "it may be very possible that there were other causes that *also* contributed to his asthma" but they were irrelevant because "[u]nder the FELA, the railroad is liable for Mr. Battaglia's damages if the exposure to diesel exhaust *contributed to any degree*, even the slightest, to Mr. Battaglia's asthma." *Id.* at 12.

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[9] Moreover, every case brought under the Jones Act, 46 U.S.C. § 30104, the federal law governing liability for workplace injuries to seamen, is subject to the same standards and judicial interpretations that apply to FELA. *See Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (noting that the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]") (internal quotation marks omitted).

The courts below agreed and granted summary judgment because they concluded that under FELA, a "railroad is liable if the exposure contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a; *id.* at 11a ¶ 40 ("An injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages"). Measured against that standard, the courts below ruled that the affidavit of plaintiff's retained expert – who stated that Battaglia's "exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma," Plaintiff's Motion for Summary Judgment, Ex. C ¶ 7 – was sufficient to satisfy the necessary "nexus" set forth in cases such as *Rogers* between Respondent's exposure and his alleged asthma. Pet. App. 9a ¶ 33.[10] Given the concession that there were other potential causes of plaintiff's condition, this case should have gone to a jury.

Moreover, under Ohio and federal law, when reviewing a motion for summary judgment, courts are required to "'view the evidence presented through the prism of the substantive evidentiary burden.'" *Myocare Nursing Home, Inc.* v. *Fifth Third Bank*, 787 N.E.2d 1217, 1222 (Ohio 2003) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). Here, there can be no dispute that the courts below denied Conrail a jury trial on the question of causation based on their holdings that the "relaxed" standard of

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[10] The courts below did not consider whether Dr. Kelly's affidavit could satisfy a heightened "proximate cause" standard. Indeed, as noted, Respondent underscored in his motion that he was not obligated to "prove that exposure to diesel exhaust *was* the proximate cause of Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 13.

causation set forth in *Rogers* governed whether plaintiff had met his burden of showing that exposure to diesel exhaust caused Battaglia's alleged injuries. As a result, adoption of the traditional common-law proximate causation standard in this case requires the Court to vacate the judgment and permit the case to be tried. *E.g.*. *Sorrell*, 549 U.S. at 172 (vacating judgment of state court and remanding "for further proceedings not inconsistent with this opinion").[11]

B. The Decision Below Conflicts With Binding Precedents Of This Court.

Review also should be granted because, contrary to the decisions below, this Court's precedent firmly establishes that a FELA plaintiff must prove proximate causation. See, *e.g.*, *Tennant* v. *Peoria & Perkin Union Ry.*, 321 U.S. 29, 32 (1944) (interpreting FELA as requiring plaintiffs to prove that "negligence was the proximate cause in whole or in part" of the employee's injury); *accord Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) (a railroad's action is "the proximate cause of an injury" only if it was "the natural and probable consequence of the negligence" and "ought to have been foreseen in the light of the attending circumstances" (internal quotation omitted)).

This long-recognized rule reflects that it is "clear common law that a plaintiff had to prove that a

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[11] For example, under Ohio law, an expert's statement that an alleged defect was a "significant factor" in causing a plaintiff's injury has been held to be inadequate to satisfy the requirement of proximate causation. *See Rhodes* v. *Firestone Tire & Rubber Co.*, No. 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept. 25, 2008) (holding that an expert report stating that a defect in a tire was a "significant factor" in a tire failure was insufficient to establish proximate causation).

defendant's negligence caused his injury proximately, not indirectly or remotely," *Sorrell*, 549 U.S. at 173 (Souter, J., concurring), and that this common law standard has not been "expressly rejected in the text of [FELA]," see *Gottshall*, 512 U.S. at 544. Accordingly, this Court has "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring).

The Court's decision in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), illustrates the fundamental role of proximate cause under FELA:

> [A]n employee cannot recover under [FELA] if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him[.]

Id. at 243. Decisions from this Court preceding,[12] and following *Davis*,[13] likewise recognize that liability

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[12] *See, e.g.*, *Norfolk & W. Ry.*, 229 U.S. at 118-120; *St. Louis, Iron Mountain & S. Ry.*, 229 U.S. at 280; *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921).

[13] *See, e.g.*, *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-11 (1926); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Nw. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Brady*, 320 U.S. at 483; *Coray* v. *S. Pac. Co.*, 335 U.S.

under FELA is limited to injuries that a defendant's negligence proximately causes. These cases remain binding precedent.

Some courts, however, have misread *Rogers* to have overturned *sub silentio* nearly a half century of this Court's FELA precedents. But *Rogers* is entirely consistent with the long line of this Court's decisions requiring FELA plaintiffs to prove proximate causation. *Rogers* addressed the distinct issue of whether a FELA plaintiff has the burden to prove that a wrongful act was the "sole, efficient, producing cause of injury," a more demanding requirement than the proximate causation standard. 352 U.S. at 506. The statement in *Rogers* that FELA affixes liability on a railroad when its negligence "'played any part, even the slightest'" in the employee's injury spoke only to "the occasional multiplicity of causations." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (quoting *Rogers*, 352 U.S. at 506). *Rogers* did not alter "the necessary directness of cognizable causation." *Id.*[14]

520, 523 (1949); *Urie*, 337 U.S. at 177; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949).

[14] Following *Rogers*, this Court has stated in dicta that FELA adopts a "relaxed standard of causation", *Gottshall*, 512 U.S. at 543, and that a FELA plaintiff "is not required to prove common-law proximate causation," *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). These statements are correct, to the extent they merely acknowledge that FELA does not adopt the older common law conception of "sole proximate cause," which this Court addressed in *Rogers*. *See Sorrell*, 549 U.S. at 175 (Souter, J., concurring). But any suggestion that *Rogers* "relaxes" the federal rule of proximate causation is contrary to FELA's text and cannot be reconciled with the extensive line of this Court's precedents applying that standard under FELA.

Moreover, *Rogers* dealt with FELA's "in whole or in part" statutory language, which plainly does not alleviate a plaintiff's burden to prove proximate causation. This provision establishes only that a FELA injury can have more than one proximate cause, thereby abolishing the common law regime of pure contributory negligence. Accordingly, *Rogers* only held that a standard of "sole proximate cause" could not be reconciled with a statute adopting a standard of comparative negligence. See *Sorrell*, 549 U.S. at 175 (Souter, J., concurring).

The narrow ruling in *Rogers* simply did not reverse decades of decisions concluding that liability under FELA only exists where railroad "negligence was *the proximate cause* in whole or in part" of the employee's injury. *Tennant*, 321 U.S. at 32 (emphasis added). This is made all the more clear by the fact that *Rogers* derived its "test of a jury case" from *Coray* v. *Southern Pacific Co.*, which explicitly states that FELA requires plaintiffs to prove either that railroad negligence was "the sole or a contributory *proximate* cause" of the employee's injury. 335 U.S. 520, 523 (1949) (citing *Davis*, 263 U.S. at 243; *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 509-10 (1916)(emphasis added)). There is simply no basis for interpreting *Rogers*, or, for that matter, any other precedent of this Court, as unsettling the long-established proximate cause standard under FELA. *Rogers* merely made clear that in cases where a jury could find that both the employee's and the railroad's negligence could be legal causes of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury were slight relative to the employee's.

At a minimum the conflicts and confusion created by *Rogers* unquestionably warrant this Court's

review, and this case, which did not even get to the jury on the issue of causation, provides an ideal vehicle for deciding the issue presented.

II. THE DECISION BELOW IMPOSING LIABILITY UNDER FELA FOR A VIOLATION OF A SAFETY REGULATION CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE INTERPRETATION OF AN AGENCY'S REGULATIONS.

Review should be granted because the decision below conflicts with this Court's decisions holding that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.*, 512 U.S. at 512. As this Court has explained, in construing the requirements of a federal rule, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation marks omitted); *accord Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *accord Bowles*, 325 U.S. at 414; Davis, *supra*, at § 7.22, 105.

The decision below violates these standards because the court of appeals never assessed whether the FRA's interpretation of § 229.43(a) was "plainly erroneous" or "inconsistent with the regulation." Instead, the court of appeals substituted its own independent judgment regarding the meaning of § 229.43(a) for that of the expert agency and then, based on that erroneous interpretation, imposed liability on the railroad. The court of appeals did not assess whether the exhaust allegedly entered the cab after being released from the exhaust stack or whether it entered the cab directly as a result of a defect in the locomotive's exhaust system. Likewise, the court did not evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA.

Instead, according to the Ohio Court of Appeals, "it is clear that the intent of the rule is to protect occupants of the cab of a locomotive from exposure to *toxic* exhaust emissions during normal operating conditions." Pet. App. 10a-11a ¶ 38 (emphasis added). As a result, the court saw "no ambiguity" and ruled that, regardless of the point of entry, "if during normal operation exhaust enters the cab, the rule is violated." *Id.*

In marked contrast, the FRA has interpreted § 229.43(a) in these circumstances to require compliance with the "limits for the concentration" set forth by OSHA for the "common products of diesel fuel combustion." Pet. App. 45a-46a; *id.* at 50a ("FRA also will continue to apply OSHA criteria as reference standards to determine compliance with the [LIA]"). By tying compliance to the levels of exposure identified as acceptable by OSHA, the FRA's interpretation of § 229.43 properly takes into account concerns regarding exposure to levels of diesel exhaust deemed "toxic" by OSHA while recognizing that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. at 21,098. FRA's interpretation is thus faithful to the language of § 229.43(a), addresses the core concern of exposure to "toxic" levels of diesel exhaust and is therefore reasonable under the circumstances. The FRA's interpretation of Section 229.43(a) thus should have been accorded "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 512.

In contrast, the court of appeals' decision effectively requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the

locomotive cab.[15] Indeed, the court of appeals embraced Battaglia's position that § 229.43 "doesn't permit 'some,' or 'limited,' *or even 'reasonable' amounts* to be emitted within the cab." Plaintiff's Motion for Summary Judgment at 11. As a result, the court of appeals adopted a *per se* standard under which Petitioner is liable "based merely on the fact that the exhaust was present in the cab in violation of federal regulations under regular operating conditions." *Id.*[16]

This is a virtually impossible standard for railroads to defend, and effectively renders every locomotive in possible violation of a federal safety regulation. The decision below requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the locomotive cab. Cf. *Dixson* v. *Burlington N. R.R.*, 795 F. Supp. 939, 940 (D. Neb. 1992) (holding that § 229.43 is ambiguous as to whether it applies only to the lead locomotive). Even if the court of appeals' reading were a permissible one, the decision below ignores that the FRA is responsible for deciding "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

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[15] *Kayner* v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas County, Neb. Mar. 2, 2006) (noting that "the LIA regulation, 49 C.F.R. 229.43, does not provide that the cab must be entirely free of all diesel exhaust, . . . only that the locomotive exhaust stacks be of sufficient height to allow the diesel exhaust to be released entirely outside the cab and to prevent reentry of the exhaust under usual operating conditions").

[16] Plaintiff put forth no quantitative evidence regarding the level of his exposure to diesel exhaust, and never argued that it exceeded the thresholds adopted by OSHA.

Review should be granted because the court of appeals' refusal to defer to the FRA's interpretation of § 229.43(a) conflicts with this Court's long-standing precedent governing the interpretation of federal regulations. Moreover, the draconian interpretation of the regulation coupled with the rejection of a requirement of proximate causation eviscerates the requirement that employees are only entitled to damages for injuries that are the product of a railroad's negligence. The regime in Ohio makes the railroad the guarantor of its employees' health, even when there clearly are multiple potential causes of injury. This is not the liability scheme that Congress implemented in the FELA and only review by this Court can put FELA back on the right course.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

[Filed FEB. 10, 2010]

Case No. 2009-2148

FRANCIS BATTAGLIA

v.

CONRAIL *et al.*

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Lucas County Court of Appeals; No. L081332)

/s/ THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

APPENDIX B

Court of Appeals of Ohio,
Sixth District, Lucas County.

No. L-08-1332.

FRANCIS BATTAGLIA,

Appellee,

v.

CONRAIL, *et al.*,

Appellant.

Decided Oct. 16, 2009.

SINGER, J.

{¶ 1} A railroad appeals a $2.6 million workplace injury award issued in the Lucas County Court of Common Pleas to a former railroad employee. For the reasons that follow, we affirm.

{¶ 2} Appellee, Francis Battaglia, began work for appellant, Consolidated Rail Corp. ("Conrail") in 1976 as a brakeman. In 1979, appellant furloughed him. He did not work for any railroad again until 1988, when he was called back. Between 1988 and 1993, he was a brakeman and a conductor. Following training, in 1993, appellee became a locomotive engineer, a position he held until 2007, when he received medical leave.

{¶ 3} According to appellee, during his tenure with the railroad, he was continuously exposed to diesel exhaust which would infiltrate into the locomotive cab through holes in the floor, cracks in improperly

sealed windows and doors and through the equipment compartment. In his deposition testimony, appellee reported that he frequently complained about this condition, but repairs were ineffective.

{¶ 4} At some point, appellee began to experience respiratory distress. On consultation, a pulmonologist diagnosed appellee with asthma. According to appellee, the physician advised him to retire from the railroad to escape further exposure to diesel exhaust.

{¶ 5} On September 9, 2005, appellee instituted the suit that underlines this appeal. In his complaint, appellee alleged that appellant negligently caused the conditions that caused his asthma, a claim under the Federal Employees Liability Act ("FELA"); and, in doing so, violated the terms of the Locomotive Inspection Act ("LIA"), 49 U.S.C. 20701, and regulatory railroad safety standards as articulated in Section 229 et seq., Title 49 C.F.R. Appellant responded, denying liability.

{¶ 6} Following some discovery, appellee moved for partial summary judgment. Appellant filed a memorandum in opposition. On June 15, 2007, the court granted appellee's motion, concluding that appellee's assertion of prolonged exposure to diesel exhaust fumes in the cab of his locomotive was unrefuted, as was his physician's affidavit that such exposure was a cause of his asthma. Moreover, the court concluded, the existence of diesel exhaust was a violation of the unambiguous requirements of Section 229.43(a), Title 49 C.F.R., constituting per se negligence under the LIA. Since any degree of negligence is sufficient under FELA to establish causation for an injury, the court granted appellee's motion for partial summary judgment. The court denied appellant's motion for reconsideration.

{¶ 7} On August 21, 2007, appellee moved for partial summary judgment on its FELA claim on the ground that the judgment of a violation of the LIA, already entered, constituted a per se violation of FELA. On April 8, 2008, the court granted appellee's motion and the matter went forward for a jury trial on damages only. At the conclusion of the trial, the jury awarded appellee $2.6 million. The trial court entered judgment on the verdict and denied appellant's motions for a J.N.O.V., new trial and remittitur. This appeal followed.

{¶ 8} Appellant sets forth the following nine assignments of error:

{¶ 9} "I. The trial court erred in granting summary judgment in favor of Battaglia on his LIA claim

{¶ 10} "II. The trial court erred in granting summary judgment on the issue of liability under the FELA and limiting the trial to damages only

{¶ 11} "III. The trial court erred in denying Conrail's motion or a continuance of trial due to discovery abuses

{¶ 12} "IV. The trial court erred in denying Conrail's motion to prelude [sic] the testimony of Dr. DeLara and Dr. Kelly

{¶ 13} "V. The trial court erroneously permitting [sic] exposure testimony in a damages only trial

{¶ 14} "VI. The trial court improperly instructed the jury regarding workers' compensation, emphysema, assumption of the risk and other liability points of law

{¶ 15} "VII. The trial court erred in denying Conrail's motion for directed verdict and judgment notwithstanding the verdict because of Battaglia's

failure to present evidence relating to lost wages with reasonable certainty

{¶ 16} "VIII. The jury's verdict should be reversed because it did not calculate net present value, and did not deduct local, state and federal taxes, personal consumption or other required deductions

{¶ 17} "IX. The award of $2,600,000 is against the manifest weight of the evidence, the result of speculation and undue passion and prejudice"

I. Summary Judgment

{¶ 18} In its first two assignments of error, appellant insists that the trial court's decision to grant partial summary judgment on both the LIA and FELA claims was erroneous.

{¶ 19} An appellate court examines an award of summary judgment de novo, employing the same standard as a trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 20} " * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67; Civ.R. 56(C).

{¶ 21} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine

issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts as would be admissible in evidence showing that there is a genuine issue of material fact. Civ.R. 56(E); *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App.3d 223, 228; *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing Anderson *v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 22} Appellee submitted his initial motion for summary judgment accompanied by his affidavit and that of a co-worker averring that the cabs in the locomotives in which they worked were regularly, over a prolonged period, infiltrated with diesel exhaust. Also with the motion was the affidavit of physician R. Michael Kelly who stated that he had, " * * * concluded to a reasonable degree of medical certainty that Mr. Battaglia's ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma[.]"

{¶ 23} Appellee, citing *Lilly v. Grand Trunk Western R.R. Co.* (1943), 317 U.S. 481, 485, insisted that the Locomotive Inspection Act, originally known as the Boiler Inspection Act, imposes on a railroad an absolute duty to operate locomotives safely. Statutorily, this includes an obligation to operate a locomotive, " * * * only when the locomotive or tender and its parts and appurtenances—(1) are in proper condition

and safe to operate without unnecessary danger of personal injury[.]" Section 20701(1), Title 49, U.S.Code.

{¶ 24} Moreover, appellee asserted, diesel exhaust infiltration into a locomotive cab is also an express violation of a federal safety regulation which provides:

{¶ 25} "(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." Section 229.43(a), Title 49 C.F .R.

{¶ 26} Appellee insisted that the unrefuted presence of diesel exhaust in the locomotive cabs in which he worked constituted a breach of an absolute duty imposed by law. Pursuant to *Rogers v. Missouri Pacific R. Co.* (1957), 352 U.S. 500, 508, when a railroad's negligence, in any degree, contributes to an injury at issue in a FELA claim, liability adheres to the railroad. As a result, appellee maintained, appellant is liable for his asthma and he was entitled to summary judgment on his LIA claim.

{¶ 27} Appellant responded, asserting that there were questions of fact in three areas which would preclude summary judgment: (1) whether appellee was "exposed" to diesel exhaust, (2) whether the exhaust in the locomotive cab in which appellee worked constituted a violation of the Locomotive Inspection Act, and (3) whether appellee's asthma was caused by his exposure diesel exhaust.

{¶ 28} Appellant maintained that Section 229.43(a), Title 49 C.F.R. is ambiguous and should be interpreted in a manner consistent with that adopted by the administrative agency tasked with enforcing the

rule, the Federal Railroad Administration ("FRA"). According to an affidavit and documents from a former FRA administrator, the agency recognized that it would not be possible to eliminate all diesel fumes from the locomotive cab in some conditions.

{¶ 29} Rather than develop its own rules for limits on the concentration of fumes or regulations for air exchange rates for locomotive cabs, the agency chose to use standards promulgated by the Occupational Safety and Health Administration ("OSHA"). Since appellee failed to show that the conditions in the locomotives in which he worked exceeded the permissible exposure levels or time weight averages established by OSHA, appellant argued, appellee neither established that he was "exposed" to diesel fumes, nor that there was a violation of the regulation. Therefore, appellant failed to show a violation of the LIA.

{¶ 30} Concerning causation, appellant attached a document from an environmental expert who opined that appellee's exposure to exhaust was not likely excessive and was not at levels known to cause asthma. The asthma was likely triggered by other things, including a smoking habit that had ended 31 years earlier. Appellant also submitted a letter from a physician who opined that causation for appellee's asthma was "multifactoral," but not related to the railroad.

{¶ 31} In appellee's response, he reiterated his arguments concerning the violation of the regulation and pointed out that the reports on which appellant relied to contradict appellee's physician on the issue of causation were unauthenticated by affidavit or otherwise. Appellant, even though it filed a sur-reply

and an amended sur-reply, failed to remedy the lack of authentication for its expert reports.

{¶ 32} In its decision on appellee's motion for partial summary judgment on his LIA claim, the court concluded that Section 229.43(a), Title 49 C.F.R. is " * * * clear and unambiguous—products of combustion shall be released entirely outside the cab." Since the unrefuted affidavits of appellee and his co-worker sufficiently established that diesel exhaust was released into the cab, the court found that appellant had violated the safety regulation.

{¶ 33} Relying on *Aparicio v. Norfolk & Western Ry. Co.* (C.A.6 1996), 84 F.3d 803, for the proposition that the railroad is liable if the exhaust exposure contributed to any degree, "even the slightest" to appellee's asthma, the court found that such a nexus had been established by Dr. Kelly's affidavit. The court stated that it could not and did not consider the contradictory reports submitted by appellant, because these reports were unauthenticated by affidavit and were, thus, not in conformity with Civ.R. 56(E). On these conclusions, the court granted appellee's motion for partial summary judgment on the LIA violation claim. Appellant's motion for reconsideration and request to resubmit newly authenticated reports were rejected.

{¶ 34} Appellee subsequently moved for partial summary judgment on its FELA claim on the ground that the LIA violation triggered per se liability under FELA. This motion too was granted.

{¶ 35} Appellant claims that the trial court was wrong when it refused to consider the administrative interpretation of Section 229.43(a), Title 49 C.F.R and in rejecting consideration of their unauthenticated expert opinions on the question of causation. It also

suggests that the trial court should have accepted their resubmission with accompanying affidavits presented after summary judgment was granted.

{¶ 36} It has long been held that where a statute is unambiguous, "* * * there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legislation * * *. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1943), 143 Ohio St. 312, 316; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106; *Barth v. Barth*, 113 Ohio St.3d 27, 2007-Ohio-973, ¶ 10, fn 1. The same applies to administrative rules properly promulgated under statutory authority. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 10.

{¶ 37} Appellant has directed us to no authority that found Section 229.43(a), Title 49 C.F.R. ambiguous as it relates to a lead locomotive cab. It points to *Dixson v. Burlington Northern R. Co.* (D. Nebraska 1992), 795 F.Supp. 939, but there the district court concluded that it was not clear if the rule applies to *trailing* locomotives. Appellee points to *Norfolk Southern R. Co. v. Baker* (1999), 237 Ga.App. 292, which holds that the provision is unambiguous, but appears to do so on the basis of an evidentiary deficiency. Neither of these cases is particularly useful to our analysis.

{¶ 38} The plain language of the rule is more persuasive. Although appellant argues that the thrust of the rule is about stack heights, it is clear that the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions. It is directed that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through

stacks of sufficient height or provide "other means" to prevent the exhaust from entering the cabin in normal operation. We see no ambiguity here. Clearly, if during normal operation exhaust enters the cab, the rule is violated.

{¶ 39} Appellant has never suggested that the conditions experienced by appellee were in any way the result of unusual operating conditions, nor has it presented evidence contradicting appellee's assertion of exposure. Consequently, appellee's exposure to such exhaust is a violation of a safety regulation.

{¶ 40} An injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages. *Rogers v. Missouri Pac. R. Co.* (1957) 352 U.S. 500, 508; *Aparicio v. Norfolk & Western Ry. Co.* supra, at 808. A violation of a safety regulation constitutes negligence per se. *Walden v. Illinois Cent. Gulf R.R.* (C.A. 7 1992), 975 F.2d 361, 364, citing *Kernan v. American Dredging Co.* (1958), 355 U.S. 426, 432-433. Consequently, appellant's violation of a safety regulation establishes its negligence.

{¶ 41} Concerning causation, appellant insists that there is a question of material fact, pointing to the unsworn contradictory opinions of its medical experts. Had the court not erroneously excluded consideration of these documents, appellant maintains, there would have been a triable issue.

{¶ 42} "Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material

fact remains for trial." *Green v. B.F. Goodrich Co.* (1933), 85 Ohio App.3d 223, 228; *Citizens Ins. Co. v. Burkes* (1978), 56 Ohio App.2d 88, 95-96.

{¶ 43} Accordingly, the trial court properly excluded appellant's documents from consideration when the motion for summary judgment became decisional. Moreover, since appellant was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency, the trial court acted well within its discretion in denying it yet another bite of that apple. As a result, the court properly granted summary judgment to appellee on its LIA claim. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 44} Since liability under the LIA and FELA is coextensive, violation of the former constitutes a claim under the latter. *Urie v. Thompson* (1949), 337 U.S. 164, 194; *Lilly v. Grand Trunk Western R. Co.* (1943), 317 U.S. 481, 485. Accordingly, appellant's second assignment of error is not well-taken.

II. Motion to Continue Trial

{¶ 45} Trial on the issue of damages only was scheduled to begin on April 21, 2008. On April 14, 2008, appellant filed a motion to continue the trial asserting a lengthy enumeration of purported discovery violations. The motion was apparently argued in an off the record telephone conference prior to trial. The trial court tacitly denied the motion by directing that the trial continue as scheduled. In its third assignment of error, appellant insists that the court's denial of a continuance was erroneous.

{¶ 46} The decision whether to grant a continuance is within the sound discretion of the trial court, and will not be grounds for reversal absent an abuse

of that discretion. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9. An abuse of discretion is more than a mistake of law or an error in judgment. The term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 47} The parties argued at length as to whether there were discovery violations, seemingly contesting every detail. Notwithstanding these allegations and counter-allegations, by the time appellant's continuance motion was filed, this case had been on the court's docket for nearly three years. A trial date of April 14, 2008 was first set on September 27, 2007, and rescheduled for April 21 on January 8, 2008. Absent clear and compelling indicia to the contrary, a court acts within its discretion when it adheres to its own scheduling order. Moreover, other than subsequent references to the telephone conference, there is no record, so the regularity of the proceeding must be presumed. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, appellant's third assignment of error is not well-taken.

III. Expert Witnesses

{¶ 48} Prior to trial, appellant moved in limine to bar the testimony of appellee's treating physicians, Dr. Antonio DeLara and Dr. R. Michael Kelly. Dr. DeLara should not testify, appellant insisted, in sanction of discovery violations. Dr. Kelly's testimony should not be permitted because he failed to articulate a proper differential diagnosis for appellee and his anticipated testimony that asthma developed into emphysema was speculative.

{¶ 49} A trial court has broad discretion in determining the admissibility of expert testimony. The

determination of the court on such issues will not be disturbed absent an abuse of discretion. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 16.

{¶ 50} With respect to Dr. DeLara, the trial court either found that the discovery violations of which appellant complained were not proven or concluded that any violation did not operate to appellant's prejudice. Appellant has failed to articulate how these decisions constituted an arbitrary, unreasonable or unconscionable attitude by the court. *Blakemore*, supra.

{¶ 51} Concerning Dr. Kelly, any issue of differential diagnosis as a determinant of scientific reliability goes to causation. *Cutlip v. Norfolk Southern Corp.*, 6th Dist. No. L-02-1052, 2003-Ohio-1862, ¶ 45. In the present matter, causation was properly determined on summary judgment and was not at issue in trial.

{¶ 52} Dr. Kelly's testimony regarding the relationship between asthma and emphysema was in response to appellant's assertion during trial that it was emphysema rather that asthma that accounted for appellee's breathing difficulties. Being as this was an issue that appellant inserted into trial, it can hardly claim prejudice if its opposition presents opposing testimony.

{¶ 53} Accordingly, appellant's fourth assignment of error is not well-taken.

IV. Exposure Testimony

{¶ 54} During trial appellant attempted to block testimony from appellee and other railroad workers as to their regular daily exposure to diesel exhaust in the cabs of appellee's locomotives. Since causation had already been established, appellant insisted, testimony as to exposure to exhaust was irrelevant and

its introduction served only to arouse the passion of the jury. The trial court admitted such testimony over appellant's objection.

{¶ 55} Appellee maintains that the exposure testimony went not to causation, but to refute appellant's assertion that his asthma was mild rather than severe as maintained by appellee's treating physicians. Showing the frequency of exposure corroborated his doctors' assessment of his condition, appellee suggests. Moreover, according to appellee, his daily exposure to diesel exhaust was relevant to his request for an award of damages for pain and suffering and mental anguish for the time he was forced to breathe these fumes.

{¶ 56} Evidence which is permissible for one purpose may be admitted, even though there may be a purpose for which such evidence is inadmissible. *Dorsten v. Lawrence* (1969), 20 Ohio App.2d 297, 302; Evid.R. 105. When this occurs, the rule requires a trial court to issue a limiting instruction to the jury if an opposing party requests such an instruction. *Id.* If no such instruction is requested, however, any error is waived. *Lewicky v. Accurate Bldg. Sys.* (Dec. 3, 1998), 8th Dist. No. 72906.

{¶ 57} In this matter, evidence as to appellee's exposure to diesel exhaust was admissible on the issue of the severity of appellee's condition and to establish pain and suffering. Appellant failed to request any limiting instruction. Accordingly, appellant's fifth assignment of error is not well-taken.

V. Jury Instructions

{¶ 58} In its sixth assignment of error, appellant complains that it was prejudiced by the trial court's instruction that workers' compensation did not apply to appellee; that, if the jury could not differentiate between damages resulting from emphysema and those from asthma, appellant was liable for the whole; and that assumption of the risk was not a defense.

{¶ 59} "A charge to the jury should be a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. The trial court is vested with broad discretion in fashioning the language of the charge and its determination as to the propriety of the instructions will not be disturbed absent an abuse of that discretion. *Garbers v. Rachwal*, 6th Dist. No. L-06-1212, 2007-Ohio-4903, ¶ 19.

A. Workers' Compensation

{¶ 60} Prior to deliberation the trial court, in its instructions, advised the jury that appellee brought the suit against appellant, " * * * for injuries and damages he received while in the course of his employment as a locomotive engineer. *Railroad employees are not covered by workers' compensation.* Congress has passed federal legislation requiring railroad employees to bring these actions in Court * * *. [Appellee] has done so." (Emphasis added.)

{¶ 61} Appellant does not contend that this instruction is an inaccurate statement of the law. Rather, it claims that by advising the jury that workers' compensation is unavailable to railroad workers, the court violated a corollary to the collateral source rule and that this violation operated to its prejudice.

Appellant cites to cases in several foreign jurisdictions which, it claims, find introduction of this information reversible error.

{¶ 62} Appellee insists that the instruction belongs in the case because most jurors assume that railroad workers are eligible for workers' compensation and may improperly adjust an award to take such compensation into account. Moreover, appellee maintains, it is local custom in both state and federal courts to include such language.

{¶ 63} In *Eichel v. New York Central R. Co.* (1963), 375 U.S. 253, a railroad worker pursued a FELA claim for injuries sustained on the job. When the worker prevailed at trial, the railroad appealed, arguing that it should have been permitted to introduce as evidence of a motive for not returning to work testimony that the plaintiff was receiving disability payments. The appeals court reversed on this ground and ordered a new trial on damages. (2 C.A.1963), 319 F.2d 12, 14. On further appeal, however, the Supreme Court of the United States reversed the court of appeals, concluding that the likelihood of the misuse of this information by the jury outweighed its probative value and could operate to the plaintiff's prejudice. 375 U.S. at 255.

{¶ 64} A corollary of the *Eichel* ruling forms the basis for the cases upon which appellant relies. In *Weinell v. McKeesport Connecting R. Co.* (3 C.A.1969), 411 F.2d 510, a railroad employee prevailed in a FELA suit after a jury trial. The railroad appealed on a number of grounds, including the trial court's refusal to instruct the jury that FELA was not the only source by which the plaintiff could recover for his injury. This instruction was requested in response to the statement of plaintiff's counsel during opening

that FELA, " * * * provides the only method by which a railroad employee * * * may recover damages * * *." The appeals court reversed the verdict, not on this ground, but because the court had issued to the deliberating jury a "dynamite instruction" that, if they were unable to reach a verdict, it would be an " * * * an encouragement to the Communists * * *." *Id.* at 513. In passing, the court noted that it considered plaintiff's opening comments "improper" and " * * * we assume will not be made again." *Id.* at 512.

{¶ 65} In *Stillman v. Norfolk & Western R. Co.* (4 C.A.1987), 811 F.2d 834, 838, an unsuccessful FELA plaintiff argued that the trial court erred in refusing his proposed instruction that recovery under FELA was his only possible remedy and that he would receive no workers' compensation benefits. The appellate court rejected this argument, finding workers' compensation " * * * completely irrelevant to the issues in the case, and allowing the jury to consider such information could have prejudiced the railroad." Moreover, citing *Eichel*, the court noted that defendants in FELA cases are not allowed to inform a jury that a plaintiff has received benefits from a collateral source. "We perceive no reason for a different rule when the plaintiff in a FELA case seeks to inform the jury of the absence of benefits from a collateral source." *Id.*

{¶ 66} *Stillman* was followed, and perhaps expanded, in *Hileman v. The Pittsburgh and Lake Erie R. Co.* (1996), 546 Pa. 433, 437 ("Railroad employees do not automatically receive worker's [sic] compensation payments * * *" deemed an erroneous charge.); *Kansas City Southern R. Co. v. Stokes* (Texas App., 2000), 20 S.W.3d 45, 48-50 (" * * * not entitled to benefits under Texas Workers Compensation laws, and

the Federal Employers Liability Act is his exclusive remedy * * * " instruction was reversible error.); *Schmitz v. Canadian Pacific R. Co.* (7 C.A.2006), 454 F.3d 678, 685 (Trial court properly refused to answer jury question as to whether plaintiff received workers' compensation benefits.)[.]

{¶ 67} None of the cases appellant cites are binding upon this court. Ultimately, our question is whether instructions containing language reflecting a correct statement of the law is so prejudicial to the railroad that its inclusion constitutes an abuse of discretion. Pursuant to *Eichel*, at 255, this involves an analysis of whether the likelihood that the jury will misuse this information outweighs its value.

{¶ 68} In *Eichel*, the court concluded that the introduction of evidence of the plaintiff's disability pension payments was improper. Such payments could in no way be used in mitigation of other damages and the use of such evidence in support of the proposition that such payments might precipitate malingering was, at best, tenuous. Inclusion of such evidence, then, would result in a potential for misuse by the jury that outweighed the value of the evidence. *Id.*

{¶ 69} This rule, according to appellant, has now morphed into a flat rule that any mention of workers' compensation payments, or the lack thereof, in a FELA case is per se reversible error. We are perplexed at this purported result.

{¶ 70} In *Weinell*, at 512, in dicta and without any analysis or citation to authority, the appeals court disapproves telling the jury that a FELA action is the "only way" a railroad worker may be compensated for an on-the-job injury. *Stillman*, at 838, echoes this

conclusion and, citing *Eichel* for the proposition that a defendant may not inform a jury of collateral benefits, essentially finds that what is good for the goose is good for the gander. *Stillman* also deals with whether a jury may be informed that FELA is the plaintiff's "only possible remedy." *Stokes* is also an exclusive remedy case. *Hileman* and *Schmitz* are pure "no mention" of workers' compensation cases.

{¶ 71} The most persuasive of these cases, in our view, is *Schmitz* because it involves a question from a jury as to whether a FELA plaintiff can collect workers' compensation. This question lends considerable credence to appellee's argument that uninstructed jurors might assume that a FELA plaintiff is entitled to other compensation. It seems to us that, just as a jury informed of collateral disability payments might improperly reduce an award, so too might a jury that mistakenly assumes that a FELA plaintiff will receive collateral workers' compensation benefits be tempted to adjust its award. Given this potential mischief, we cannot say that the trial court acted arbitrarily, unreasonably or unconscionably when it instructed the jury that appellee was not eligible for workers' compensation on this claim.

B. Emphysema

{¶ 72} The court instructed the jury:

{¶ 73} "If you award damages, you shall award Plaintiff such a sum as you believe will fairly and justly compensate him for his asthma. If you find that Plaintiff's pulmonary or lung injuries also involve emphysema, you shall award no sum for the emphysema. If you cannot separate asthma from emphysema with respect to the Plaintiff's pulmonary

and lung damage, the Plaintiff is—the Defendant is liable for all such pulmonary and lung damage."

{¶ 74} Appellant insists that this instruction unfairly holds it responsible for appellee's emphysema even though asthma was the sole basis of liability.

{¶ 75} Appellee responds that it was appellant who brought emphysema into the case, positing it as a cause for some or all of appellee's debility. Since it was appellant who asserts that emphysema, not asthma, caused appellee's diminished health, the burden of proof should be on appellant to demonstrate the degree of emphysema's influence on appellee's health. Moreover, appellee maintains, emphysema should not have been permitted in the case at all, because FELA holds a railroad responsible for an employee's injury irrespective of the degree of the railroad's relative fault.

{¶ 76} "Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad regardless of whether the injury was also caused 'in part' by the actions of a third party." *Norfolk & Western R. Co. v. Ayers* (2003), 538 U.S. 135, 165-166. "FELA allows an injured worker to recover his entire damages from the railroad whose negligence jointly caused an injury, thus placing on the railroad the burden of seeking contribution from other tortfeasors." *Hess v. Norfolk Southern R. Co.*, 153 Ohio App.3d 580, 2003-Ohio-4172, ¶ 55, rev., in part, on other grounds, 106 Ohio St.3d 389.

{¶ 77} This issue must be considered in the specific factual and procedural posture of the case. The jury heard conflicting testimony from experts who testified that emphysema was a progression of asthma and that it was not. The same experts divided on the

question of whether appellee's emphysema was a recent development or had existed coextensively with his asthma for some time. The sole basis of liability had already been determined to have been asthma and, indeed, appellee attempted to limit the damages trial to evidence concerning only asthma.

{¶ 78} We do not believe that in this context *Ayers* and *Hess* are applicable. Those cases dealt with a single injury that may have had been caused by one or more agents in addition to the railroad. Here, there was testimony submitted, if believed, by which the jury could have found that appellee had two distinct conditions. Of these two injuries, it had been determined on summary judgment that appellant was only responsible for one.

{¶ 79} Nevertheless, we conclude that the instruction was proper. It was appellant that advanced the theory that its damages should be mitigated because emphysema rather than asthma was at their root. It seems reasonable that the proponent of such a position should have the burden to demonstrate the degree to which this might be so. See *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, syllabus. This is the effect of the challenged instruction.

C. Assumption of the Risk

{¶ 80} The court charged the jury:

{¶ 81} "You are further instructed that assumption of the risk is no bar to recovery under the Federal Employers' Liability Act or the Locomotive Inspection Act.

{¶ 82} "[Appellant], cannot require [appellee] to assume the risk of injury while working for the railroad, and [appellant] may not argue that it is not

liable or that its liability should not [sic] be reduced because of [appellee's] assumption of the risk."

{¶ 83} Appellant argues that an instruction on assumption of the risk goes to liability, which had already been determined on summary judgment. Appellant suggests that the instruction was irrelevant and operated to its prejudice.

{¶ 84} We agree with appellant that the instruction was surplusage in a damages-only trial, but we fail to see, and appellant fails to articulate, in what manner this charge operated to its prejudice.

{¶ 85} Accordingly, appellant's sixth assignment of error is not well-taken.

VI. Expert Wage Testimony

{¶ 86} In its seventh assignment of error, appellant suggests that the trial court erred in denying its motion for a directed verdict or a J.N.O.V. because appellee failed to present expert testimony on the issue of his lost wages.

{¶ 87} A motion for a directed verdict shall be granted if a trial court, " * * * after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party* * *." Civ.R. 50(A)(4). A motion for a judgment notwithstanding the verdict may be sustained, " * * * only if there was insufficient evidence to permit reasonable minds to reach different conclusions, and conversely, the trial court had a duty to overrule the motion for judgment notwithstanding the verdict if there was sufficient evidence to permit reasonable minds to reach differ-

ent conclusions." *McComis v. Baker* (1973), 40 Ohio App.2d 332, 335, citing *O'Day v. Webb* (1972), 29 Ohio St.2d 215 at paragraph four of the syllabus.

{¶ 88} Appellant insists that a plaintiff's recovery for lost wages must be established with reasonable certainty and may not be permitted when the evidence is subject to speculation and conjecture. Such certainty may only be achieved, according to appellant, by testimony of an expert in such matters. In support of this proposition, appellant cites *Sampson v. Missouri Pacific R. Co.* (Mo.1978), 560 S.W.2d 573, 589.

{¶ 89} Appellee responds that he testified to the wages he had been making, the date he could no longer work for the railroad and the amount of time that he intended to continue working. Appellee insists that all of this testimony was within his knowledge and it was all the jury needed to compute his lost wages. No expert testimony was necessary, and certainly not mandated.

{¶ 90} *Sampson* is not a FELA case. It is a Missouri tort action and, as nearly as we can ascertain, premised wholly on Missouri law. It is not binding precedent for this court, nor do we find it particularly persuasive. Appellant cites no other authority for its assertion that mandatory expert testimony must be offered to prove lost wages.

{¶ 91} Appellee was competent to testify to all of the elements necessary to compute lost wages. Appellant had the opportunity to cross examine appellee and was free to call its own expert if it so chose. Like the trial court, we find no grounds to support a directed verdict or a J.N.O.V. Accordingly, appellant's seventh assignment of error is not well-taken.

VII. Damage Calculations

{¶ 92} In its eighth assignment of error, appellant contends that the jury improperly computed its award because appellee failed to present evidence of either a method to reduce the award to present value or information detailing his state and federal income taxes so as to allow the jury to non-speculatively exclude such items from the award. Appellee responds that nothing in the law mandates that he present testimony on either of these issues.

{¶ 93} An award for wage loss from future earnings under FELA is computed by taking estimated gross wages, less federal and state taxes that would not be incurred because the amount is a tort award rather than earnings. *Norfolk & Western R. Co. v. Liepelt* (1980), 444 U.S. 490, 493. The product of this calculation is then reduced to present value. *St. Louis Southwestern R. Co. v. Dickerson* (1985), 470 U.S. 409, 411-412.

{¶ 94} While it has been held to be error to deny a FELA defendant the right to put on evidence about reducing an award by taxes or adjusting to present value, *Liepelt* at 494; *Monessen Southwestern R. Co. v. Morgan* (1988), 486 U.S. 330, 340, appellant presents us with no compelling authority of a concomitant duty of a FELA plaintiff to come forth with such evidence. Indeed the approved method for dealing with these issues is a jury charge. *Liepelt* at 498; *Monessen* at 342.

{¶ 95} In this matter, the trial court instructed the jury:

{¶ 96} "If your verdict is in favor of the Plaintiff, you will not add any sum of money to the amount of the verdict to account for income taxes * * * because

the amount awarded to the Plaintiff by your verdict is not taxable income to the Plaintiff, and you should not consider income taxes in fixing the amount of your award."

{¶ 97} The court also instructed at length on how to reduce the award to present value and provided the jury with present value tables as a suggested method of computing present value.

{¶ 98} Both of these instructions are in conformity with the charges upheld in the cases. If, as it is presumed to do, *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195, the jury followed the instructions of the court, its award computations were proper. Accordingly, appellant's eighth assignment of error is not well-taken.

VIII. Manifest Weight

{¶ 99} In its final assignment of error, appellant asserts that the verdict was against the manifest weight of the evidence and the award of $2.6 million was "clearly excessive."

{¶ 100} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Great deference is given to the jury who, by virtue of its ability to observe the demeanor of the witnesses and test the witnesses' credibility, is presumed to have delivered a correct verdict. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 101} We have carefully examined the transcripts of these proceedings. There was clearly evidence submitted which, if believed, supported all of the

elements necessary to award appellee damages for his injury. As far as the amount of the award, appellant's only argument seems to be that $2.6 million is a lot of money, so obviously the jury lost its way or succumbed to the throes passion.

{¶ 102} Appellee presented evidence tending to show that for more than two decades he had been exposed to diesel exhaust in his workplace, that this exposure caused and then exacerbated his asthma and that his condition would eventually worsen, almost certainly reducing his lifespan. Given this, we cannot say that the jury's award was excessive.

{¶ 103} Accordingly, appellant's ninth assignment of error is not well-taken.

{¶ 104} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist. Loc.App.R. 4.

PETER M. HANDWORK, P.J., and ARLENE SINGER, MARY J. BOYLE, JJ., concur.

Judge MARY J. BOYLE, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Case No.: CI 05-5191

FRANCIS BATTAGLIA,
Plaintiff,

vs.

CONRAIL, *et al.*,
Defendants.

Honorable Denise Ann Dartt

OPINION AND JOURNAL ENTRY

I. STATEMENT OF FACTS

Plaintiff Francis Battaglia was hired by Conrail on September 7, 1976, as a trainman/brakeman, was promoted to conductor, and in 1993 became an engineer. On September 9, 2005, Mr. Battaglia filed the instant action against Conrail, Norfolk Southern Corporation, CSX Transportation, Inc., and Conrail Shared Assets. Mr. Battaglia claims that during his tenure with the railroad he has been continuously exposed to diesel exhaust inside his locomotive cabs in which he works and such exposure was the cause of his asthma. The Complaint alleges violations of the Federal Employers' Liability Act (Count One), the Locomotive Inspection Act (Count Two), and 49 C.F.R. Section 229 et seq. (Count Three).

This cause is now before the Court upon Plaintiffs Motion for Partial Summary Judgment as to Count Two only.

II. SUMMARY JUDGMENT STANDARD

The Supreme Court of Ohio has set forth a tripartite test that must be met before a motion for summary judgment can be granted: that there is no genuine issue as to any material fact; that movant is entitled to judgment as a matter of law; and that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

A party who claims to be entitled to summary judgment on the grounds that a nonmovant cannot prove its case bears the initial burden of: 1) specifically identifying the basis of its motion, and 2) identifying those portions of the record that demonstrate the absence of a genuine issue of material fact regarding an essential element of the nonmovant's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The movant satisfies this burden by calling attention to some competent summary judgment evidence, of the type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmovant has no evidence to support his or her claims. *Id.* Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ. R. 56(E), indicating that a genuine issue of material fact exists for trial. *Id*; accord *Vahila v. Hall*, 1997-Ohio-421, 77 Ohio St.3d 421.

III. DISCUSSION

Plaintiffs Motion for Summary Judgment and Defendants' Responses raise the following issues:

1) whether Mr. Battaglia was exposed to diesel exhaust during the course of his employment with Conrail; 2) whether such exposure constitutes a violation of the Locomotive Inspection Act; and 3) whether Mr. Battaglia's asthma was caused by his exposure to the diesel exhaust.

A. Plaintiff's Exposure to Diesel Exhaust

Mr. Battaglia testified in his deposition that he has been continuously exposed to diesel exhaust inside the locomotive cabs since the first day he "hired out." He further testified that diesel exhaust entered the locomotive cabs through holes in the floors, cracks in the doors, in the seals, and through the windows and equipment compartment. Mr. Battaglia has frequently reported the unsafe condition of the locomotives to the railroad.

James Kermans, a co-worker of Mr. Battaglia, stated in his affidavit that seals on the doors and windows of locomotive cabs almost always leaked, allowing diesel exhaust fumes to enter the cabs. In addition, Mr. Kermans stated that the locomotives were rarely maintained properly causing toxic diesel exhaust fumes to come into the cab through the firewalls, electrical cabinets, and cracks in the floor.

Defendants contend that Plaintiff must establish that his exposure exceeded the permissible exposure levels (PELs) or time weight averages (TWA) for measurement of diesel exhaust set forth by the Occupational Safety and Health Administration (OSHA) or the American Conference on Governmental Indus-

trial Hygienist (ACGIH). However, Defendants have failed to cite any authority stating that Plaintiff must demonstrate that his exposure exceeded the PELs or TWA. To the contrary, Plaintiff has clearly established through his testimony and that of Mr. Kermans that he was exposed to diesel exhaust inside the cab during the course of his employment.

B. Locomotive Inspection Act

A railroad is absolutely liable under the Locomotive Inspection Act if a locomotive, either in violation of the statute or the regulations promulgated thereunder, causes injury or death. *Lilly v. Grand Trunk Western Railroad Co.* (1943), 317 U.S. 481; *Urie v. Thompson* (1949), 337 U.S. 163, 190. A finding of absolute liability is appropriate where there has been a violation of a safety statute specifically aimed at the railroad industry. *Ries v. National Railroad Passenger Corp.* (1992), 960 F.2d 1156, 1159.

In the instant case, Plaintiff alleges that Defendants violated 49 C.F.R. 229.43(a) which states as follows:

> "Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions."

Defendants argue that 49 C.F.R. 229.43(a) is not clear on its face and, therefore, the Court should give deference to the FRA's interpretation of the regulation. However, the Court finds that the regulation is clear and unambiguous—products of combustion shall be released entirely outside the cab. See, *Norfolk Southern Railway Co. v. Baker* (1999), 237 Ga. App.

292, 514 S.E.2d 448. Since Plaintiff's deposition and his co-worker's affidavit have sufficiently established that diesel exhaust fumes were released into the cab on a regular basis, the Court finds that Defendants have violated 49 C.F.R. 229.43(a).

C. Causation

The railroad is liable if the exposure contributed to any degree, even the slightest, to Plaintiffs asthma. *Aparicio v. Norfolk & Western Railway Co.* (6th Cir. 1996), 84 F.3d 803.

Dr. R. Michael Kelly concluded in his affidavit and report to a reasonable degree of medical certainty that "Mr. Battaglia's ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma."

In response, Defendants rely upon the report of Dr. David Rosenberg which states that Plaintiff's asthma was not related to his employment with the railroad but rather to his past smoking history, esophageal reflux and atopy. However, Dr. Rosenberg's report was not properly authenticated by an affidavit and is thus not acceptable Civ.R. 56(E) evidence and cannot be considered by this Court.

Defendants also rely on reports by Dr. Laura Green which state that there is no scientific literature to support a causal connection between asthma and exposure to diesel exhaust. Dr. Green concluded that "I cannot find compelling or otherwise reliable evidence that on the job exposures at Conrail have harmed Mr. Battaglia's lungs." Again, Dr. Green's reports are unsworn testimony and under Civ.R. 56(E) cannot be considered by this Court.

Therefore, the Court finds that Plaintiff's exposure to the diesel exhaust fumes contributed to his asthma. Accordingly, Plaintiff is entitled to judgment as a matter of law on Count Two of his complaint.

JUDGMENT ENTRY

It is ORDERED that Plaintiff's Motion for Summary Judgment on Count Two is GRANTED.

The trial date of October 9, 2007 is confirmed as to Counts One and Three.

An assessment of damages on Count Two is continued to trial date.

Date: June 15, 2007 /s/ Denise Ann Dartt
Denise Ann Dartt, Judge

APPENDIX D

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Case No.: CI 05-5191

FRANCIS BATTAGLIA,
Plaintiff,

vs.

CONRAIL, *et al.*,
Defendants.

Honorable Denise Ann Dartt

OPINION AND JOURNAL ENTRY

This cause is before the Court upon Plaintiff's Motion for Partial Summary Judgment on Count One and Defendant Conrail's Motion to Reinstate the Unresolved Portions of its Motion for Summary Judgment. After full consideration of the memoranda and evidence submitted and the applicable law, for the reasons that follow this Court finds Plaintiff's Motion well-taken but Defendant's Motion not well-taken, leaving damages as the only issue for trial.

I. Plaintiff's Motion for Partial Summary Judgment.

On June 15, 2007, this Court granted Plaintiff's Motion for Partial Summary Judgment as to Count Two (Locomotive Inspection Act violation), finding that Plaintiff clearly established that he was exposed to diesel exhaust inside the cab, that Defendants

violated 49 C.F.R. 229.43(a) by failing to prevent entry of products of combustion into the cab, and that Dr. Kelly's affidavit established that Plaintiff's ongoing exposure to diesel exhaust was a significant factor in the development of Plaintiff's asthma, concluding that Plaintiff's exposure to the diesel exhaust fumes contributed to Plaintiff's asthma. Defendants' Motion for Reconsideration was denied August 2, 2007.

On August 21, 2007, Plaintiff filed a Motion for Partial Summary Judgment as to Count One (violation of Federal Employers Liability Act) and voluntary dismissal of Count Three (regulatory violation).

For a Federal Employers Liability Act ("FELA") claim, Plaintiff need only show a LIA violation and that the violation caused, at least in part, plaintiff's injury. *Crane v. Cedar Rapids & Iowa City Railway Co.* (1969), 395 U.S. 164, 166; *Fontaine v. National Railroad Passenger Corp.* (1997), 54 Cal. App.4th 1519, 1526. Thus, if the court finds an LIA violation, such violation constitutes negligence per se. *Urie v. Thompson* (1949), 337 U.S. 163, 189; *Paul v. Genesee & Wyoming Industries, Inc.* (W.D. NY 2000), 93 F.Supp.2d 310, 315; *Haworth v. The Burlington Northern and Santa Fe Railway Co.* (E.D. Wash. 2003); 281 F.Supp.2d 1207, 1210-11; *Mickler v. Minishillen & Tuscarawas Ry. Co.* (6th Cir. 1993), 13 F.3d 184, 188; *Waggoner v. Ohio Central Railroad, Inc.* (S.D. Ohio 2007), Case No. 2:06-CV-250, 2007 U.S. Dist. Lexis 87197, at pgs. 8, 11. Where there is a violation of the LIA, the railroad is liable and the court need not consider the negligence claim under FELA. *Hinkle v. Norfolk Southern Railway Co.* (S.D. Ohio 2006), 2006 U.S. Dist. Lexis 92515, at *22; *Kobe*

v. Canadian National Railway Co. (D. Minn. 2007), Civ. No. 06-3439, 2007 WL 2746640, at *7.

On June 15, 2007, this Court found that Defendants violated the LIA by failing to prevent the entry of diesel fuel into the cab and that this exposure to diesel fuel contributed to Plaintiff's asthma. Therefore, Plaintiff has demonstrated that Defendants were negligent and that such negligence proximately caused Plaintiff's injury.

Once the court finds that a defendant has violated a safety statute and such violation caused, at least in part, Plaintiff's injury, evidence of contributory negligence and evidence of other possible causes is eliminated for *any* purpose. *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 436-37 (1949); *Eckert v. Aliquippa & Southern R.R. Co.* (3rd Cir. 1987), 828 F.2d 183, 186; *Haworth*, supra at 1214; *Pratico v. Portland Terminal Co.* (1st Cir. 1985), 783 F.2d 255, 260; *Neal v. Saga Shipping Co.* (5th Cir. 1969), 407 F.2d 481, 485-86.

Defendants cite to 45 U.S.C. Section 53 which states that damages shall be diminished in proportion to the amount of negligence attributable to the employee, but Defendants ignore the exception at the end:

> "Provided, That no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee."

Since this Court has already determined that Defendants violated the LIA and such violation contributed to Plaintiff's injury, the above exception applies and

the Court is prohibited from considering any evidence regarding Plaintiff's contributory negligence or other possible causes for his injury.

The Court therefore finds that no genuine issues of material fact exist and Plaintiff is entitled to judgment as a matter of law as to Count One.

II. Defendant Conrail's Motion to Reinstate the Unresolved Portions of Its Motion for Summary Judgment.

On September 7, 2007, Defendants filed a Motion for Summary Judgment arguing that only Conrail was Plaintiff's employer and that Plaintiff failed to produce a liability expert report establishing that Defendants' alleged negligence was the cause of his alleged asbestos related injuries. On January 25, 2008, Defendants withdrew their Motion.

Defendant Conrail filed a Motion to Reinstate the Unresolved Portions of its Motion for Summary Judgment on February 29, 2008. Defendant claims that the portion of its Motion dealing with Plaintiff's failure to produce a liability expert regarding asbestosis is still an issue. However, Plaintiff's complaint does not even contain any cause of action related to asbestos or asbestos-related injuries—Plaintiff is alleging injury as a result of exposure to diesel exhaust, not asbestos. Furthermore, the Motion to Reinstate is untimely as Motions for Summary Judgment were to be filed by September 7, 2007.

Accordingly, Defendant's Motion to Reinstate is not well-taken.

JOURNAL ENTRY

It is ORDERED that Defendant's Motion to Reinstate the Unresolved Portions of its Motion for

Summary Judgment is DENIED.

It is further ORDERED that Plaintiff's Motion for Partial Summary Judgment as to Count One is GRANTED, leaving damages as the only issue for trial.

Date: April 8, 2008 /s/ Denise Ann Dartt
Denise Ann Dartt, Judge

APPENDIX E

THE SUPREME COURT OF OHIO

[April 14, 2010]

Case No. 2009-2148

FRANCIS BATTAGLIA

v.

CONRAIL *et al.*

RECONSIDERATION ENTRY
Lucas County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Lucas County Court of Appeals; No. L081332)

/s/ PAUL E. PFEIFER
PAUL E. PFEIFER
Acting Chief Justice

APPENDIX F

FEDERAL STATUTES

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

49 U.S.C. § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

APPENDIX G

FEDERAL REGULATION

49 C.F.R. § 229.43. Exhaust and Battery Gases

(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

(b) Battery containers shall be vented and batteries kept from gassing excessively.

APPENDIX H

U.S. Department of Transportation

Federal Railroad Administration
Office of Safety Assurance and Compliance

LOCOMOTIVE CRASHWORTHINESS AND CAB WORKING CONDITIONS

REPORT TO CONGRESS

September 1996

CHAPTER 7

Locomotive Cab Air Quality

Poor cab air quality can be caused by the entry of diesel exhaust gases into the cab. The causes are exhaust system leaks and vented gas entering through the cab windows and other apertures. Concerns often arise when the locomotive is idling or moving through enclosed spaces such as tunnels or deep cuts. Exposure may be greatest for employees while occupying cabs of trailing (non-lead) locomotives.

The diesel engine emissions of primary concern are carbon monoxide (CO), oxides of nitrogen (as NO_2), and hydrocarbon (HC) vapors and particulates. Tests under "worst case" conditions indicate that personnel in the cabs of trailing locomotives may occasionally be exposed to concentration levels of oxides of nitrogen air contaminants in excess of recognized occupational exposure limits. Continued vigilance is needed to prevent exposure to harmful exhaust emissions.

The potential entry of diesel exhaust gases into spaces occupied by the crew is a primary concern with respect to locomotive air quality. Two modes of entry exist. First, exhaust system leaks may allow exhaust to enter the cab prior to being vented up the stack. Current FRA regulations cover locomotive exhaust system leaks of this type. Second, a possibility exists that properly vented exhaust gases may enter the cab. Stacks are generally high enough, or located aft to the direction of travel of the cab, so that entry of properly vented exhaust gases into cabs of lead locomotives moving outside of enclosed spaces—such as tunnels—is not a problem. The highest potential for cab contamination by properly vented exhaust gases exists with idling locomotives, locomo-

tives moving through enclosed spaces such as tunnels or deep cuts, and occupied cabs of trailing locomotives. This chapter addresses the findings of a study conducted by FRA in an effort to identify and quantify problems such as these. This study consisted of a review of existing regulations, a study of the effects of air quality on human performance, a review of injury/illness data due to fumes reported to FRA between 1990 and 1994, and air quality testing in the Cascade Tunnel.

Review of Existing Federal Regulations and Standards

FRA reviewed the existing Federal regulations and standards covering workplace and vehicle air quality. The existing FRA regulation covering locomotive cab air quality is contained in 49 CFR 229.43(a) and (b) as follows:

> *Exhaust and Battery Gases*
>
> *(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.*
>
> *(b) Battery containers shall be vented and batteries kept from gassing excessively.*

FRA does not specify limits for the concentration of the products of diesel fuel combustion, and does not require air exchange rates for locomotive cabs. However, the Occupational Safety and Health Administration (OSHA) does specify workplace concentration Limits in 29 CFR §1910.1000 (Air Contaminants) for

the common products of diesel fuel combustion listed in Table 7-1:

OSHA Limits for Air Contaminants

GAS	MAXIMUM 8-HOUR TIME WEIGHTED AVERAGE (TWA) EXPOSURE CONCENTRATION
Nitric Oxide (NO)	25 parts per million (ppm)
Nitrogen Dioxide (NO_2)	5 ppm—at no time shall exposure exceed
Sulfur Dioxide (SO_2)	5 ppm
Carbon Monoxide (CO)	50 ppm
Carbon Dioxide (CO_2)	5000 ppm

Table 7-1

FRA employs the OHSA criteria to determine compliance with the Locomotive Inspection Act[1]:

> §20701. Requirements for use
>
> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances:
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

[1] Public Law 103-272, July 5, 1994.

(3) can withstand every test prescribed by the Secretary under this chapter.

The U.S. Military specifies the following air quality standards for crew spaces of military vehicles in MIL-STD-1472, Human Engineering Design Criteria for Military Systems, Equipment, and Facilities:

- Outside fresh air shall be supplied at minimum rate of 20 ft^3 per minute per person. Air flow rates for hot-climate operation temperatures above 90° F shall be maintained between 150 ft^3 and 200 ft^3 per minute per person, unless air conditioning is provided. Air velocity at each person's head location shall be adjustable either continuously or with not less than three ratings (off, low, and high) from near zero to at least 400 feet per minute.
- Air shall be moved past personnel at a velocity not more than 200 feet per minute. When manuals or loose papers are used, airspeed past these items shall not be more than 100 feet per minute, if possible, to preclude pages in manuals from being turned by the air or papers from being blown off of work surfaces.
- Ventilation or other protective measures shall be provided to keep gases, vapors, dust, and fumes within the Permissible Exposure Limits specified by 29 CFR §1910 and the limits specified in the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLV). Intakes for ventilation systems shall be located to minimize the introduction of contaminated air from such sources as exhaust pipes.

FRA also investigated how FAA regulates aircraft cabin air quality. Discussions with FAA human factors engineering staff responsible for aircraft heating, ventilation and air conditioning (HVAC) revealed that FAA has only very general HVAC requirements because the commercial sector is very competitive in this area, and is therefore market-driven. Current aircraft designs greatly outperform the only two criteria specified by FAA, listed as follows:

- Each crew compartment must be ventilated, and each crew compartment must have enough fresh air (but not less than 10 cubic feet per minute per crew member) to enable crew members to perform their duties without undue discomfort or fatigue.
- Crew compartment air must be free from harmful or hazardous concentrations of gases or vapors. In meeting this requirement, the following apply:
  - Carbon monoxide concentrations in excess of one part in 20,000 parts (or 50 ppm) of air are considered hazardous.
  - Carbon dioxide in excess of three percent by volume (sea level equivalent) is considered hazardous in the case of crew members. Higher concentrations of carbon dioxide may be allowed in crew compartments if appropriate protective breathing equipment is available.

* * *

Cab Air Quality Measurement Conclusions

Data submitted to FRA by railroads shows approximately 50 railroad employees per year become ill due

to exposure to poor air quality in locomotive cabs, resulting in approximately 1000 days per year of lost time. This is a problem that railroads should not ignore. However, several sets or gas sampling measurements taken over the past 25 years have failed to confirm a widespread problem with cab air quality, even under conditions tested to closely simulate a worst case scenario.

FRA concludes that personnel in the cabs of trailing locomotives may be occasionally exposed to concentration levels of oxides of nitrogen air contaminants in excess of recognized occupational exposure limits, under certain adverse train operating conditions such as passing through long tunnels. Due to the high levels of gases found in the trailing cab of trains passing through regions of restricted air exchange such as long tunnels, railroads should monitor cab air quality and take appropriate responsive action. For instance, a railroad could either:

- provide a means for providing suitable air quality for the crew riding in the trailing locomotive, with means such as positive air pressure in the cab to inhibit the entry of air contaminants; or
- not permit the crew to ride in the trailing locomotive while passing through tunnels or similar environments.

The new locomotives may provide a better air quality environment for the crew. As the older locomotives are replaced with newer units, the trend of air quality is improving.

FRA recommends that railroads conduct a study of their operations to determine sites and types of operations that pose a high risk for unacceptable cab

air quality. Railroads should take operational steps to prevent exposure of personnel to high levels of diesel exhaust gases in trailing locomotive cabs at each site or during each type of operation identified.

FRA will continue to enforce requirements of FRA regulations that require exhaust gases to be properly vented. FRA will also continue to apply OSHA criteria as reference standards to determine compliance with the Locomotive Inspection Act, as codified. FRA does not intend to pursue further rulemakings that addresses cab air quality at this time. However, FRA will continue to monitor the number of reported illnesses due to cab air quality. If industry efforts do not result in a decrease in the number of incidents attributable to poor air quality, further actions will be taken.